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In the
Supreme Court of the United States
OCTOBER TERM, 1943

No. 235

GREAT NORTHERN LIFE INSURANCE COMPANY,
Petitioner,

AGAINST

JESS G. READ, Insurance Commissioner
for the State of Oklahoma,
Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

This is Not a Suit Against the State
(Petitioner's Brief 12-19; Respondent's Brief 6-9)

Respondent argues (respondent's brief 6-9) that this action was brought pursuant to Section 12665, Oklahoma

Statutes 1931, and that an action brought under that statute is necessarily a suit against the state. Respondent goes so far as to say (respondent's brief 6) that petitioner "admittedly" brought this action under the authority of that statute and cites page 21 of petitioner's brief as support for the statement. Reference to the last mentioned page will show the statement to be erroneous for at that point in its brief petitioner was arguing its proposition that "even" if this suit were against the state the state has waived its immunity to suit in the Federal court. Plainly petitioner's argument at the point in question was on the assumed premise, for the purpose of the argument only, that the suit was against the state. Apparently respondent would like to have petitioner concede that its recovery must be, if at all, pursuant to Section 12665, but petitioner refuses to make that concession.

In reply to respondent's argument that this action was brought pursuant to Section 12665, petitioner submits that the answer to the question of what petitioner's action consists of, its nature and how it was brought, is to be found by considering the averments made in petitioner's complaint, the contents of respondent's answer, including the admissions there made, and the evidence in the record. If under the case so made petitioner is entitled to the judgment sought, the exact theory of recovery is of no particular moment.

The Whole Record Shows Suit Not Against the State

The whole record of the case-made discloses that this action is not against the State of Oklahoma. The decisions of this Court cited in petitioner's main brief (p. 15), hold that the whole record will be looked at to determine the question of who is the real party to the action. It was decided in 1824 in the case of *Osborn* v. *Bank of United States*, 22 U. S. 738, 9 Wheat. 738, — L. ed. 204, that the parties to the record will be determined by the way they are named in the action. However, very shortly thereafter this Court modified that holding by the adoption of the more reasonable rule that in determining the parties to the action the whole record will be examined.

In *Reagan* v. *Farmers' Loan and Trust Company* (1894), 154 U. S. 362, 38 L. ed. 1014, 14 Sup. Ct. Rep. 1047, (petitioner's brief, pp. 22, 23, 24), Mr. Justice Brewer assembled by quotations from prior decisions of this Court an excellent classification pursuant to which various situations may be tested in determining whether the state is being sued. Measured by the tests laid down in that decision and by subsequent decisions of this Court, the whole record here involved indicates that this action is not against the State of Oklahoma. What does the whole record show?

In the written protest under which petitioner paid the taxes here involved (a copy of which protest was made a

part of the complaint) petitioner vigorously asserted that the April 1941 4 per cent tax act was wholly unconstitutional and void, and that the payment pursuant thereto was made to respondent under coercion and duress to avoid burdensome penalties and to prevent cancellation of petitioner's license in the state (R. 9). The protest also enjoined respondent to segregate the fund and not to pay it into the state treasury, and notified respondent that petitioner would "at the time and in the manner provided by law, institute suit for recovery of the same, *or take other appropriate action to protect its legal rights* • • •" (R. 9, italics supplied). If by these words and if by demanding that the funds be segregated it is indicated that petitioner, among other things, had in mind Section 12665, what difference does it make? The fact remains that respondent did segregate the funds and that those funds remain for all purposes of this suit in an identified fund. The reason or basis for the action of respondent in holding these funds separate is of no moment to this consideration. What does the complaint show on the subject of who is the real party against whom the action is brought?

In the title of its complaint petitioner named as defendant "Jess G. Read, Insurance Commissioner for State of Oklahoma." In its complaint petitioner alleged (R. 2-6) that petitioner "is threatened with deprivation of this (its) property and investment by the collection under duress by the defendant, as Insurance Commissioner

of Oklahoma, of certain taxes levied under color of certain laws of the State of Oklahoma • • •;" that "by coercion and duress," defendant has collected the tax complained of; that "as required by the Oklahoma laws challenged herein, plaintiff paid said tax • • • involuntarily and under protest and for the purpose of avoiding the burdensome penalties threatened to be imposed and to prevent cancellation of the right of the plaintiff to continue in business within the State of Oklahoma • • •;" that "the gross premium tax • • • involuntarily paid is unconstitutional, illegal, excessive and void for the reason • • •" that the tax laws complained of "are unconstitutional and in contravention of the Fourteenth Amendment to the Constitution of the United States, Section 1 • • •;" that the tax laws in question in attempting to levy an arbitrary and discriminatory tax upon plaintiff "seek to deprive the plaintiff of its rights under the Fourteenth Amendment of the Federal Constitution • • •;" that the act of the defendant in enforcing said revenue measures by receiving and collecting the taxes is in contravention of the Fourteenth Amendment to the Constitution of the United States. And finally that "all of the statutes and the state constitutional provisions indicated and action of the defendant denied to the plaintiff the equal protection of the laws."

And so it appears that there can be no uncertainty on the point that the record shows that petitioner alleges

the April, 1941, taxing statute to be wholly unconstitutional and void, and alleges that the tax which was exacted by respondent under color of that wholly void act was exacted under coercion and duress, and that the tax was paid in order to avoid burdensome penalties and to prevent a cancellation of petitioner's license to transact business in the state. These averments are wholly inconsistent with the contention that the suit is against the state.

One of the principal tests going to determine if an action is against the state is the presence in the action of the issue of whether the statute under which the officer is alleged to have acted is unconstitutional. In such a case the theory is that the individual who is sued has acted without authority, and that it is incumbent upon him to produce a valid law which justified his action. An unconstitutional law will be treated as null and void. If the officer collects and holds tax money under a void statute he acts without right or authority. In the absence of a valid law the officer stands as a wrongdoer and is in no sense acting in behalf of the state. This test applied to the case at bar stamps this action as being one against Jess G. Read, individually.

The duty of respondent in the respects here involved was purely ministerial and no discretion on his part was involved. Segregation of the tax money and holding it intact was a ministerial duty. In case petitioner failed to pay the tax his duty required him to cancel petitioner's

license and to sue for the penalty. The performance by respondent of this ministerial duty would have deprived petitioner of rights guaranteed to it under the constitution. The moneys here involved have been earmarked as property being held in trust, possibly to be returned to petitioner. The money is in a separate fund and petitioner claims that that fund belongs to it. In case the money is repaid to petitioner the general revenue of the state will not be depleted and the only result will be that that revenue will not be wrongfully augmented. The mere fact that petitioner has asserted that respondent is an officer of the state is immaterial and the designation may be considered to be surplusage and *descriptio personae*. The state is not named a party as such.

In the prayer of its complaint petitioner asked for a judgment against respondent for $8,198.31 and also asked for such other and further relief as is just (R. 6). Such relief as so prayed for, is, it is submitted, neither warranted nor permitted by Section 12665. It is submitted that since this suit is not against the state, Section 12665 is inapplicable to this case.

Section 12665 Is Not Applicable

The forerunner of Section 12665 was Section 9971, Compiled Oklahoma Statutes of 1921. Section 9971, last mentioned, was found in the chapter in the Oklahoma statutes relating to "Revenue and Taxation." Section 12665,

Oklahoma Statutes of 1931, was found in a chapter of those statutes relating to "Taxation" and "Erroneous or Illegal Taxes." On May 23, 1941, Section 12665, was repealed and a new section, being Par. 15.50, Chap. 68, Oklahoma Statutes 1941, was adopted and it is found in the 1941 statutes under a title relating to "Revenue and Taxation," in the ad valorem code. Thus it appears that at the time petitioner's protest was made, Section 12665, Oklahoma Statutes 1931, was in existence, but at the time petitioner's suit was filed that section had been superceded by the adoption of Par. 15.50, Chapter 68, Oklahoma Statutes 1941.

These various sections in text are virtually identical. A reading of Section 12665, O. S. 1931, will show that the statute did not purport to deal with situations where it is claimed the tax money is exacted under an unconstitutional and wholly void legislative act nor with situations where tax money is paid as the result of coercion and duress. A reading of Section 12665 indicates that by its terms it applies to cases "where the illegality of the tax is alleged to arise by reason of some action from which the laws provide no appeal * * *." As used in the section, the word "illegality" apparently is not intended to refer to a tax which is provided for under a statute which is wholly void, but, on the contrary, is used in the sense of tax which is illegally exacted, either in whole or in part, under a valid statute. This meaning becomes clearer as the statute

is further examined. After providing that the collecting officer shall hold the tax money in a separate fund, the section provides that if suit is brought to recover the money paid and "the court shall determine that the taxes were illegally collected, as not being due the state * * *," then the court shall render judgment "showing the correct and legal amount of taxes due by such person, and shall issue such order in accordance with the court's findings and if such order shows that the taxes so paid are in excess of the legal and correct amount, the collecting officer shall pay to such person the excess * * *."

Thus it appears that the section does not contemplate a judgment in favor of the taxpayer who has paid his money under protest against the collecting officer for any excess payment, but only contemplates a judgment in favor of the collecting officer and against the taxpayer for the amount which the officer is entitled to keep. In case there is an excess in the hands of the collecting officer the section then requires him to refund that excess. The section, it would seem, is intended to cover a situation where the collecting officer has acted under a valid law, but has collected an excess amount or an "illegal" amount. In such a situation the officer may be in possession of some amount, no matter how small, which belongs to the state, whereas no part of any of the taxes collected under a wholly invalid statute would belong to the state.

The correctness of the foregoing observations seems to be confirmed by *City of Muskogee* v. *Wilkins* (1918), 73 Okla. 192, 195-196, 195 Pac. 497, where a municipal ordinance imposing a tax on the business of operating jitney busses was held to have been enacted without authority of law. It was there held that a bill for injunction was a proper remedy and that plaintiff was not required to proceed under Section 9971, O. S. 1921. The Oklahoma Supreme Court said (pp. 195-6):

> "We are of opinion, however, that the provisions of the latter section (Sec. 7, Ch. 107, S. L. 1915—matter in parenthesis supplied), do not affect the remedy invoked in the instant case. The obvious intent of the legislature in the enactment of such provisions was to afford a remedy for the correction of errors in the assessment or equalization of taxes and the recovery, when paid, of taxes illegally assessed against property, arising by reason of official action in those instances where authority to exercise the taxing power existed by reason of the constitution or laws of the state and not to cases such as this, where all authority to impose a tax of any character for revenue has been withdrawn from the political body attempting to exercise such power.
>
> "This purpose is manifested by the provision authorizing a suit to recover such taxes wherein the court shall render judgment showing the correct and legal amount due, etc. Clearly we cannot impute to the legislature an intent to sanction extortion by requiring the payment of a pecuniary imposition entirely unauthorized by the statute, even if made by municipality under guise of police power, where such body is specifically divested of authority to enact or enforce legislation on the subject. We, therefore, conclude that the plaintiff has not mistaken his remedy."

And the above observations likewise seem to be confirmed in *Carpenter et al.* v. *Shaw, State Auditor of Oklahoma* (1929), 280 U. S. 363, 74 L. ed. 478, 50 Sup. Ct. Rep. 121, where this Court held that an action to recover taxes paid under duress and compulsion and exacted in violation of the laws or constitution of the United States does not come within the provisions of Section 12665 or of its identical predecessor.

The case of *Sneed, Treasurer of the State of Oklahoma* v. *Shaffer Oil & Refinery Co.* (C. C. A. Okla. 1929), 35 Fed. (2d) 21, involved a suit to recover a tax imposed by an Oklahoma law upon foreign corporations which it was alleged denied to the plaintiff equal protection of the laws, and it was there held that Section 12665 did not apply to payment of taxes made under duress.

The Oklahoma Supreme Court apparently considers that a suit brought to recover tax money which has been commingled with the state's general funds, in which suit the court is not called upon to determine the constitutionality of the law under which the tax was exacted nor to determine if the tax was paid under coercion or duress, is a suit against the state. *Antrim Lumber Company* v. *Sneed, State Treasurer* (Okla. 1935), 175 Okla. 47, 52 Pac. (2d) 1040 (cited and relied upon, respondent's brief 7-8).

But it is clear that in *Antrim Lumber Company* v. *Sneed, supra*, the Oklahoma Supreme Court did not determine that a suit to recover taxes in which the court is

called upon to determine the constitutionality of the tax statute or to decide questions of coercion or duress, is a suit against the state or that such a suit is to be considered as governed by Section 12665. Furthermore, that court, in the case in question, approved other decisions which hold that the claim of unconstitutionality or of coercion or duress negate the argument that the suit is against the state. Among the decisions so approved of is the case of *A. T. & S. F. Ry. Co.* v. *O'Connor* (1912), 223 U. S. 280, 56 L. ed. 436, 32 Sup. Ct. Rep. 216, relied upon by the petitioner (petitioner's brief 13), but not mentioned by respondent.

Trial Court May Have Erroneously Applied Section 12665

With this record and with the foregoing analysis of Section 12665, we come to consider what must have been confusion on the part of the trial court. Notwithstanding that the essence of petitioner's protest, of its complaint, and of its case-made, was the unconstitutionality of the 1941 tax law and the coercion and duress surrounding its payment, the trial court at the pre-trial conference dwelt upon Section 12665 and determined that to recover under the provisions of that section it was unnecessary for petitioner to show coercion or duress (R. 15). It would seem that the court's remarks in this respect were intended to be confined to a possible recovery by petitioner under Section 12665 and it is petitioner's contention that the remarks

of the trial court at this time are to be so understood. Petitioner further contends that the trial court did not intend to, and indeed it could not have, removed from the case the essential issue presented by the pleading of coercion and duress which was an issue independent of any reference to Section 12665. That it was an issue is shown by *Carpenter et al.* v. *Shaw, State Auditor of Oklahoma, supra*, and by *Sneed, Treasurer, etc.* v. *Shaffer Oil & Refining Co., supra.*

Whatever the trial court had in mind when making the remarks in question, at least the issue of constitutionality remained at all times, as it still is, in the case. The trial court entered conclusions of law on this issue (R. 29) and the Circuit Court of Appeals (R. 46) made a decision on this issue which, of course, is the main issue in the case. The issue of constitutionality alone adequately places this case in the class of suits which is not considered to be against the state. *A. T. & S. F. Railway Company* v. *O'Connor* (1912), 223 U. S. 280, 56 L. ed. 436, 32 Sup. Ct. Rep. 216 (cited, petitioner's brief 13-14).

Petitioner's complaint alleged the facts and prayed certain relief. It contends that it is entitled to recover if the facts warrant any of the relief which is prayed for. Rules of Civil Procedure, Rule 8 (a). Of course, the relief prayed for is a judgment against respondent. And it is petitioner's further contention that if the facts pleaded warrant the relief prayed, the theory upon which the relief

may be granted is of no particular importance. If petitioner is entitled to relief, that relief may be granted either on the theory that the suit is not against the state or on the theory that it is a suit against the state. However, petitioner has sought to show that the correct theory upon which judgment should be rendered against respondent is that he is sued individually, and that the state is neither a necessary nor a proper party to this action. In such case this Court has jurisdiction upon the grounds of diversity of citizenship.

The State Has Waived Its Immunity to Suit in the Federal Courts as Well as in the State Courts
(Petitioner's Brief, 20, 25; Respondent's Brief, 9, 14)

It is Section 12665, or its successor, to which petitioner looks to find the waiver of immunity by the state for this suit in the federal court in case this suit is one against the state. As petitioner said in its main brief (pp. 20-21) this point becomes academic in case it is determined that this is not a suit against the state. And it is submitted that in accordance with the correct theory to be applied under the law applicable this suit is not against the state.

It is likely true as stated by respondent (respondent's brief 14) that there is not involved under *this point* actions for the recovery of taxes paid under coercion and duress (and petitioner would add taxes paid under a statute claim-

ed to be unconstitutional and void), which are not brought under the authority of a statute waiving the immunity of the sovereign state to suit for recovery thereof.

If petitioner's recovery under its complaint and the evidence can be allowed on the theory of coercion or duress or on the theory that the tax was exacted under an unconstitutional statute or under a combination of both factors, then this suit is not against the state and we are not concerned with the point of waiver of immunity. If, on the other hand, plaintiff can only recover because it paid the tax under protest and brought suit within thirty days under the provisions of Section 12665, and the suit is against the state, then only are we concerned with the question of whether the state has consented in this instance to be sued in the federal court.

This Court found a waiver of immunity to suit in a federal court under a Texas statute. *Reagan* v. *Farmers' Loan and Trust Company* (1894), 154 U. S. 362, 391, 38 L. ed. 1014, 1021, 14 Sup. Ct. Rep. 1047 (cited, petitioner's brief 22-23, respondent's brief 12). In two other cases where the statutes involved seem to have been less restrictive than that involved in the last mentioned case this Court failed to find such waiver. *Smith* v. *Reeves* (1899), 178 U. S. 436, 44 L. ed. 1140, 20 Sup. Ct. Rep. 919 (cited, petitioner's brief 18, respondent's brief 10-11). And Michigan, *Chandler* v. *Dix* (1904), 194 U. S. 590-91, 48 L.

ed. 1029-31, 24 Sup. Ct. Rep. 766 (cited, respondent's brief 11).

As against the statutory provisions involved in those cases, the only provisions of the Oklahoma statute, Section 12665, O. S. 1931, which may be cited as evidence that Oklahoma restricted suit to its own courts are the provisions (quoted, petitioner's brief 21-22, respondent's brief 9-10), that suits filed under the authority of Section 12665 "shall be brought in the court having jurisdiction thereof" and "they shall have precedence therein" and "the court shall render judgment * * *."

It is submitted that petitioner, a non-citizen, should not be debarred from that relief in the federal courts which Oklahoma affords to its own citizens in its own courts.

The Matter In Controversy Arises Under the Constitution
(Petitioner's Brief, 25-33;
Respondent's Brief, 14-19)

It is true that Mr. ~~Justice~~ Hughes, in his work on Federal Practice (respondent's brief 16-17), states, in substance, that a case arises under the Constitution of the United States when some title, right, privilege or immunity on which a recovery depends will be defeated by one construction of that constitution or sustained by an opposite construction. It is also true that a similar general statement is made in some of the opinions of this Court cited by respondent as well as in other opinions of

this Court not cited in any of the preceding briefs. However, it is submitted that this Court has not, over the years, adhered to that general statement or if it has, it has considered that when a constitutional right will be defeated by the operation, application or effect of the United States Constitution then the matter involved arises under the Constitution. This statement is borne out by the cases cited in petitioner's brief (pp. 25-33), especially *Ex parte Young* (1907), 209 U. S. 123, 52 L. ed. 714, 28 Sup. Ct. Rep. 441 (petitioner's brief 31), and *Smith* v. *Kansas City Title & Trust Company* (1920), 255 U. S. 180, 65 L. ed. 577, 41 Sup. Ct. Rep. 243 (petitioner's brief 32).

Administrative Practice and Interpretation
(Respondent's Brief, 28-33)

Respondent's explanation of administrative practice and interpretation demands clarification. The stipulation (R. 20-23) shows:

(1) When a foreign insurance company desires to enter Oklahoma for the first time, it is required "to file an application for a license therefor, same to expire the succeeding last day of February." It is further required "on or before *said date*" (which refers to the following February, and not to the time of license application) to pay a tax on all premiums "which it received in Oklahoma *after it is so licensed* and prior to the succeeding first day of January."

Respondent endeavors to make it appear that by this practice a gross premiums tax is paid at the time of application for entry. In fact, the stipulation shows that the time of payment is reached "after it is so licensed." The procedure is and has been to admit a company and then to tax it.

Under the administrative interpretation of the insurance laws, respondent has considered "said tax as being paid for the right or privilege of entering Oklahoma and doing business therein to and including *said last day of February.*"

Again the reference is to the same date, the succeeding last day of February. Thus the practice is to collect the tax at the end of the first year and after-issuance of the license. The interpretation is that payment is made for the first year. There is no intimation that respondent has ever interpreted the tax as being paid for the next or ensuing license year following "said last day of February."

(2) Stipulation number 5 covers practice and interpretation on license renewal and is the same. The company files another application and is required by respondent "as a condition precedent, *to have paid*" the same tax payment previously mentioned as being paid for the first year of business. Respondent has interpreted the payment "as having been paid for the right or privilege of *having been permitted* to enter Oklahoma and do busi-

ness therein during the *then current* license year" (which is still the first year of business). One year of time has elapsed since the first application, and although respondent refuses to renew the license unless the tax has been paid, this is still the exaction for and during the first license year of business and is so interpreted.

In like manner, administrative practice has required payment of the tax for the second or renewal year at the end of said year and has interpreted the same as payment for the second year.

Respondent's Point That Annual Privilege Taxes May Be Paid Either Before or After the Exercise of the Privilege (Respondent's Brief, 33-35)

It is established in this case that under the Oklahoma 4 per cent tax statute the tax is not due or collectible until after the end of the calendar year in which the license to do business has been issued, whether that license be an initial or a renewal license. In other words, the due date of the tax comes after the expiration in whole or in part of the time during which the foreign company has been authorized to do business in the state. The tax is collectible upon business done after the transaction of that busines has been authorized. The constitution so reads (petitioner's brief 33-34). The statute so provides (petitioner's brief, appendix II). The stipulation of facts so reads (R. 20-21). The trial court so concluded (R. 24-

27, 29-30). The Oklahoma state court so found in the *Lincoln National Life* case (R. 36, 38). The case of *Hanover Fire Insurance Co.* v. *Harding*, 272 U. S. 494, 71 L. ed. 379, 47 Sup. Ct. 179, 49 A. L. R. 713 (petitioner's brief 45-47), held that if such a tax is discriminatory it is unconstitutional and void because the tax is not an exercise of the police power of the state through the imposition of a tax as a condition to admittance to the state and is thereby arbitrary.

Respondent's argument indicates confusion due probably to the inaccurate use of the word "privilege" when referring to taxes. Perhaps it would not be incorrect to call a tax a "privilege" tax which is imposed under the police power and which is required actually to be paid before and as a condition precedent to the granting of a license to do business in the state, but neither is it incorrect to call a tax payable at a subsequent date a "privilege" tax. The fact remains, however, that the tax payable before entrance is levied in exercise of the police power whereas the tax payable at a date after entrance is not so levied.

Respondent's own effort to state that payment of the 4 per cent tax is a condition precedent shows the impossibility of stating something to be that which it isn't. For instance, respondent, in enumerating (pp. 29-30) the items with which a foreign company must comply when first entering the state, says it is required "(e) *to pay*" the 4 per

cent tax, but when does he say it is to be paid? He says it is to be paid "on or before the next succeeding last day of February." And he says to obtain a license for succeeding years such a company is required "(e) to show payment" of the tax, for what—"*for the privilege of having been permitted to enter Oklahoma and to do business therein during the then current license year.*"

Respondent asserts and reiterates (pp. 2, 3, 16) in the form of two categorical statements his conception of petitioner's contention in this case. Sufficient it is to say that petitioner denies the validity of the tax in question under any hypothesis.

The case of *Pacific Mutual Life Insurance Co.* v. *Hobbs, Commissioner of Insurance* (Kan. 1940), 152 Kan. 230, 103 Pac. (2d) 854 (discussed respondent's brief 34-35, 59-61), did not deal with the question of whether the tax there involved was repugnant to the equal protection clause of the federal constitution.

Respondent's Point That the Commissioner Did Not Make an Unconstitutional Application of the 1941 Act by Requiring Companies Seeking to Obtain a License for 1942 to Pay a 4 Per Cent Tax on Premiums Collected During 1941. (Respondent's Brief, 58-63)

The tax due at the close of the license year 1941 was a tax on the business done during the calendar year 1941. Notwithstanding this fact, however, respondent required as a condition to the issuance of licenses on March 1, 1942,

a showing that the tax due on the 1941 business had been paid.

In this manner respondent did exact a payment of the tax on 1941 business as a condition to and before the issuance of licenses on March 1, 1942. The stipulation of fact, the conclusions of the trial court and the conclusions of the state court in the *Lincoln National Life* case confirmed this practice. Was the commissioner authorized under the law to impose in this manner the payment of the tax on 1941 business as a condition precedent to the issuance of 1942 license? No doubt he found his authority for so doing in the Oklahoma constitutional provision that a foreign insurance company shall not receive a license until it shall agree to pay all such taxes and fees as may at any time be imposed by law or act of the legislature on foreign insurance companies (Sec. 1 of Art. XIX, petitioner's brief 33, respondent's brief 24).

Was the commissioner justified under the law in enforcing the foregoing constitutional provision and thus treating payment of the tax on 1941 business as a condition precedent to the issuance of 1942 licenses? The answer must be in the negative under the authority of the case of *Hanover Fire Insurance Co.* v. *Harding, supra.* According to that case, such a provision is a valid provision, but it is to be construed to apply only to such taxes as are valid when tested by the provisions of the United States Constitution. It is submitted that since the tax on 1941

business was an invalid imposition because its payment followed the authority granted to do business in the state, it could not be assigned as a tax which would have to be paid before the 1942 license was issued.

Gross Premium Tax Laws of Other States (Petitioner's Brief, 38, 40)

The only thing convincing found in the table of premium taxes supposedly imposed by the different states in the union, is the indication that the 4 per cent tax in Oklahoma is the largest of any of the taxes in any of the states except possibly the State of South Carolina, which has a higher tax on workmen's compensation premiums, and a much lower tax on premiums on all other types of insurance. Respondent states (p. 38) that he has been unable to find a single case holding any of said laws invalid under either the Fourteenth Amendment or any other constitutional provision. The statement may be true, but it does not follow that all of those tax laws are valid. In order to determine the validity of any particular tax, the nature of the tax and its imposition would have to be explored. A premiums tax was challenged and held invalid in the Hanover Fire Insurance Company case and presumably if any of the taxes in other states are imposed in a similar manner as those involved in that case they would likewise be held unconstitutional under a proper challenge.

It may be that some of the taxes mentioned in the Taxation Manual are imposed in the manner of that made use of in the Illinois 1919 statute cited in petitioner's brief at page 37. That statute provides for the payment of an arbitrary lump sum when a company first enters the state. When the company subsequently is relicensed it is then called upon to pay as a license fee a lump sum computed by a percentage of the premiums received by it in the state during the preceding calendar year. It is submitted that there could be no objection to that type of a tax. The Oklahoma tax is not that kind of a tax. Furthermore, in answer to respondent's point, it is entirely possible that a foreign company might not object to the payment of a 2 per cent tax regardless of the mechanics through which it is levied, whereas, an effort to skyrocket the tax may well call forth a challenge.

The Philadelphia Fire Association Case
(Respondent's Brief, 41-44)

Retaliatory legislation was considered in *Philadelphia Fire Association* v. *New York* (1886), 119 U. S. 110, 30 L. ed. 342, 7 Sup. Ct. Rep. 108. Respondent's observation (p. 44) that Oklahoma has a retaliatory section (36 O. S. 1941, Sec. 166), referring to taxation of Oklahoma companies in other states does not mean that the 4 per cent gross premiums tax is a part of the retaliatory section. The two are separate.

Respondent further asserts (p. 44) that 40 of the 48 states have retaliatory gross premiums taxing laws as shown by the Taxation Manual. Petitioner disputes the inference that all gross premiums taxes are retaliatory in form and nature.

No opinion of this Court seems to have commented upon the retaliatory feature involved in the Philadelphia Fire Association case, *supra*, although the purpose of such a statute, in contrast with the act challenged here, is not to police foreign insurance companies, but to insist that sister states give fair treatment to those citizens of the home state who may do business within the sister states. In this respect, retaliatory tax legislation savors of a different variety of police power from that urged by respondent in the case at bar.

In the course of its opinion in *Southern Railway Company* v. *Greene*, 216 U. S. 400, 415, 416, 54 L. ed. 536, 30 Sup. Ct. Rep. 287, this Court referred to the Philadelphia Fire case among others, but refused to follow its principle, saying that it had "adverted to these cases with a view of showing that the precise point involved herein is not concluded by any of them," and that, "we have here a foreign corporation within a state, in compliance with the laws of the state * * *."

At the time of enactment of the 4 per cent gross premiums tax and at the time of payment, petitioner was within Oklahoma in compliance with all of its laws; it was on

an equal footing with competing domestic companies and entitled to equal protection instead of discriminatory treatment.

The Hanover case, cited *supra*, placed its chief reliance upon *Southern Railway Company* v. *Greene, supra.* The Philadelphia case was cited in briefs but the Court did not discuss it directly. Instead, it pointed to opinions upon which the Philadelphia case was based, notably *Paul* v. *Virginia*, 8 Wall. 168, 19 L. ed. 357, and *Ducat* v. *Chicago*, 10 Wall. 410, 19 L. ed. 972, as settling the principle that states may impose such conditions as they will upon foreign corporations desiring to enter their jurisdictions (In neither of the cases last cited was the Fourteenth Amendment applied). The Court, in the Hanover case, then said, 272 U. S. 494, 507:

> "But there is a very important qualification to this power of the state, the recognition and enforcement of which are shown in a number of decisions of recent years."

In adding a qualification upon the power of a state to tax a foreign corporation admitted to the state, and following *Southern Railway Company* v. *Greene, supra*; it is submitted that this Court qualified the extent of the rule of *Philadelphia Fire Association* v. *New York, supra.*

If, on the other hand, the broad scope of that opinion was not narrowed, it seems clear that the gross premiums tax collected therein *was a true and, therefore, valid condition precedent to the renewal license sought.* The Penn-

sylvania corporation entered New York in 1872. It was qualified, admitted and doing business in that state when the Pennsylvania premiums tax law was passed in 1873. New York's retaliatory legislation immediately became self-executing. At the time the foreign corporation applied for a license renewal it *had paid* for the year's business then expiring. Its business experience formed a standard by which the "new tax" could be measured and the tax was capable of payment in a lump sum *prior* to the license renewal. Having previously paid for the current license year, the company was required to pay for the ensuing license year and payment was required in advance. As the Court said, the license fee was imposed "as a prerequisite for the future" (p. 119).

For the foregoing reasons, petitioner suggests that the Philadelphia Fire Association case is not controlling.

The Lincoln Life Insurance Company Case
(Respondent's Brief, 47, 50)

The findings of the District Court for Oklahoma County (R. 36-38) are virtually a recital of the administrative practices and interpretations heretofore discussed. They are incorporated in the findings on the premise that the *nisi prius* court will take judicial notice thereof since they have been effective since 1909 and are matters of common knowledge.

One of the counsel for respondent prepared the findings, as is the frequent Oklahoma practice (R. 35). The ruling on demurrer was appealed to the Supreme Court of Oklahoma (R. 38); it is not found in any reporter system.

Respondent argues that this decision must control this Court on the constitutional question here presented. Petitioner disputes the contention.

Petitioner submits that the state *nisi prius* decision cannot circumscribe the right and duty of the United States Supreme Court to determine whether the Oklahoma statute denies to petitioner equal protection of the laws. *Carpenter et al.* v. *Shaw, State Auditor of Oklahoma* (1929), 280 U. S. 363, 50 Sup. Ct. Rep. 121, 74 L. ed. 478; *Quaker City Cab Co.* v. *Commonwealth of Pennsylvania,* 277 U. S. 389, 72 L. ed. 927, 48 Sup. Ct. Rep. 553; *State of Wisconsin et al.* v. *J. C. Penny Company,* 311 U. S. 435, 85 L. ed. 267, 61 Sup. Ct. Rep. 246. It seems clear that the doctrine of *Erie Railroad Company* v. *Tompkins,* 304 U. S. 64, 82 L. ed. 1188, 58 Sup. Ct. Rep. 817, making the state common law and statutes the law governing federal decisions was limited to exclude "matters governed by the federal constitution or by acts of Congress," and that *Fidelity Union Trust Company et al.* v. *Field,* 311 U. S. 169, 85 L. ed. 109, 61 Sup. Ct. Rep. 176, is subject to the same limitation.

If regard is to be given to the *nisi prius* decision, it is to be noted that it conforms to the administrative practice and interpretation stipulated herein, which establish that the tax involved was paid at the end of the 1941 license year and for said year. Since the court found that payment followed admission instead of preceding it, the findings of fact completely contradict the legal conclusions drawn therefrom. In addition, the court did not determine that the 4 per cent tax paid at the end of the 1941 license year was a valid condition precedent to doing business during the ensuing 1942 license year.

The finding that the 4 per cent taxing act passed in April, 1941, was a tax to be paid on all premiums collected during the calendar year 1941 confirms petitioner's objection to the levy of a tax in the midst of a license year for which it had previously received authority to transact business and when it stood on a level with domestic companies. If the *nisi prius* court is to govern the finding of this Court, those findings confirm petitioner's contentions with respect to both interpretation and application of the taxing act.

The Hanover Fire Insurance Company Case
(Respondent's Brief, 50-58)

The bulk of respondent's discussion of this case is devoted to establishment of the fact that the Illinois 1919 gross premiums tax was paid as a valid condition prece-

dent to the right to do business in Illinois for the ensuing year. With this contention petitioner fully agrees. While constitutionality of the 1919 gross premiums tax was not directly involved, this Court properly treated the tax as requiring an advance lump sum payment for a privilege yet to be extended by the state. By compliance with this valid condition precedent, the company was put on a level with domestic insurance companies, but the net receipts tax under Section 30 (1869), like the Oklahoma form of gross premiums tax, applied *after admission* of the company. Since it was a tax, as distinguished from an "entrance fee," it could not meet the test of equal application.

It was not necessary for the Illinois 1919 gross premiums tax law to be analyzed by this Court. Section 6 of the 1919 law provided that the tax should "be the tax for the year commencing on the first day of July in which it is due and ending on the thirtieth day of June next thereafter" (the ensuing license year). Section 13 of that law applied to companies applying for original admission thereafter. It provided that such companies should:

> "before said license is issued, pay * * * at the rate of three hundred dollars per annum for as many months as will elapse between the date of issuance of such license and the first day of July of the calendar year succeeding * * * and such payment shall be for the privilege of doing an insurance business in this state, during the period aforesaid."

Prior to admission, a company made a lump sum payment for the ensuing year or portion thereof. Under other

sections of the statute, on the following July 1, the company made a second lump sum payment at the rate of 2 per cent of the gross premiums it had by that time received. This payment was for "the year next ensuing" (Sec. 9). Each payment preceded issuance or renewal of the license. Illinois had, and now has, a prospective privilege tax (See 1943 Illinois Revised Statutes, Ch. 73, Sections 1021-1025). Oklahoma does not.

The New York Life Insurance Company Case
(Respondent's Brief, 44-46)

Petitioner submits that neither the form of Oklahoma's taxing act nor its practical operation are prospective. The fact was acknowledged by the Oklahoma court in *New York Life Insurance Company* v. *Board of Commissioners of Oklahoma County* (Okla. 1932), 155 Okla. 247, 9 Pac. (2d) 936, when it was said:

> "In the case at bar no lump sum is designated as a license fee or privilege tax for the purpose of transacting business within the state."

Petitioner pointed out in its original brief (p. 41) that the court did not find the gross premiums tax to be a condition precedent or "entrance fee" and that constitutionality of the law was not in issue.

CONCLUSION

As respondent's brief has illustrated, gross premiums tax laws are widespread. Insurance companies have been

accustomed to them. Doubtless the great majority of those acts are, like that of Illinois, clearly constitutional on their face. And in the few remaining states the tax burden may well be equalized by imposition of other taxes on domestic companies. *Concordia Fire Insurance Company* v. *Illinois*, 292 U. S. 535, 78 L. ed. 1411, 54 Sup. Ct. Rep. 830. Of course, the prevalence of gross premiums tax laws elsewhere has been urged upon the Court as an indirect argument that a ruling of unconstitutionality herein would compel changes of policy and readjustment of state laws. It does not seem apparent that such results would follow. Oklahoma should be directed to constitutional paths by a requirement that gross discrimination be eliminated.

Where immunity from taxation is ultimately attributable to the Constitution of the United States, a state will not be allowed to invade that immunity, no matter how skillful its legal manipulations. *Board of County Commissioners of Jackson County* v. *United States*, 308 U. S. 343, 350, 84 L. ed. 313, 316, 317, 60 Sup. Ct. Rep. 285.

Petitioner renews its request for reversal of the judgment below.

Respectfully submitted,

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